Supreme Court, U.S.
FILED
JAN 19 2016
THE CLERK

No. 15-797

IN THE

Supreme Court of the United States

BOBBY JAMES MOORE,

Petitioner,

v.

TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF INTERNATIONAL ORGANIZATIONS INTERESTED IN MEDICAL EXPERTISE, PSYCHIATRY AND CRIMINAL JUSTICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com
Counsel for Amici Curiae

January 19, 2016

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Amici Curiae

Amnesty International Limited

British Medical Association

Irish Mental Health Lawyers Association

Mental Health Foundation

The Royal College of Psychiatrists

The Swedish Section of the International Commission of Jurists

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	4
ARGUMENT	6
1. *England*	8
2. *Canada*	10
3. *Australia*	10
4. *New Zealand*	11
5. *European Court of Human Rights (the "ECtHR")*	12
6. *Singapore*	13
7. *Sweden*	14
8. *Germany*	15
9. *Japan*	16
10. *Ireland*	16
CONCLUSION	16

TABLE OF AUTHORITIES

CASES — Page(s)

Atkins v. Virginia, 536 U.S. 304 (2002) 4

Ex parte Briseno, 135 S.W.3d 1 (Tex. Crim. App. 2004) ..... *passim*

Ex parte Moore, 470 S.W.3d 481 (Tex. Crim. App. 2015) 5, 7

Glossip v. Gross, 135 S.Ct. 2726 (2015) 6

Roper v. Simmons, 543 U.S. 551 (2005) 6

Thompson v. Oklahoma, 487 U.S. 815 (1988) 6

CONSTITUTION

U.S. Const. amend. VIII 5, 6

FOREIGN CASES

Bull v. Fulton (1942) 66 C.L.R. 295 (Austl.) 11

Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2004, 2 StR 367/04, BGHSt 49, 347 (Ger.) 15

Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 8, 2006, BvR 578/02, 2 BvR 796/02, BVerfGE 117, 71 (Ger.) 16

Burgess v. Leech, (2007) NSWSC 700 (July 19, 2007) (Austl.) 11

Henderson v. R [2010] EWCA (Crim) 1269, [2010] 2 Cr. App. (Eng.) 9

TABLE OF AUTHORITIES—Continued

Page(s)

Hutchison Reid v. United Kingdom, 2003-IV Eur. Ct. H.R. 1 (ECtHR) 13

Khoo James v. Gunapathy (2002) 1 SLR(R) 1024 (Sing.) 14

People (DPP) v. Kelly, [2008] 3 I.R. 697 (Ir.) 16

R v. Harris [2005] EWCA (Crim) 1980, [2006], 1 Cr. App. R. 5 (Eng.) 9

R v. Holdsworth [2008] EWCA (Crim) 971 (Eng.) 8

R v. P [2010] EWCA (Crim) 2895 (Eng.) 10

R. v. Trochym, [2007] 1 S.C.R 239 (Can.) 10

R. v. J.-L.J., [2000] 2 S.C.R 600 (Can.) 10

Rakevich v. Russia, App. No. 58973/00 (Eur. Ct. H.R. Oct. 28, 2003) (HUDOC), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414 (ECtHR) 13

Saikō Saibansho [Sup. Ct.] Jul. 17, 2000, SAIKO SAIBANSHO KEIJI HANREISHU [KEISHŪ] (Japan) 16

Shepard v. R [2011] NZCA 666, [2012] 2 N.Z.L.R 609 (C.A.) (N.Z.) 12

SR v. R, [2011] NZCA 409, [2011] 3 N.Z.L.R. 638 (C.A.) (N.Z.) 11, 12

Timbury v. Coffee (1941) 66 C.L.R. 277 (Austl.) 11

TABLE OF AUTHORITIES—Continued

Page(s)

Winterwerp v. Netherlands, App. No. 6301/73, 2 Eur. H. R. Rep. 387 (1979) (ECtHR) 13

FOREIGN STATUTES

Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, 2003 S.N.Z. No. 116, § 7(1) (N.Z.) 12

INTERNATIONAL CONVENTIONS

European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5 ..... 12, 13

OTHER AUTHORITIES

Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten [Minimum requirements for prediction expert opinions]*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] [New Journal of Criminal Law] (2006) (Ger.) 15

Martin Borgeke, *Att bestämma påföljd för brott* (Norstedts Juridik AB, Stockholm, 2 uppl. 2012) [book] (Swed.) 14

Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] (63d ed. 2016) (Ger.) 15

Inspektionen för vård och omsorg [Health and Social Care Inspectorate] (Swed.) *available at* http://www.ivo.se (last visited Jan. 14, 2016) 15

TABLE OF AUTHORITIES—Continued

Page(s)

Declan McGrath, *Evidence* (2d ed., 2015) (Ir.) 16

John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* (P.J. Richardson ed., 1st Sup, 64th ed, Sweet & Maxwell 2016) (Eng.)... 9

Socialstyrelsens författningssamling [SOSFS] 1996:14, *Rättspsykiatrisk undersökning* [official publications by governmental department], (Swed.) 14

Socialstyrelsens information om diagnostiseringskoder [National Board of Health and Welfare's information converning diagnostic codes] (Swed.), *available at* http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd (last visited Jan. 14, 2016)..... 15

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, *Amici* respectfully submit this brief *amicus curiae* in support of Petitioner.[1]

Amici are organizations, associations, institutes and foundations interested in medical expertise, psychiatry and/or the promotion of criminal justice and protection of human rights.

AMNESTY INTERNATIONAL LIMITED ("AI Ltd.") is a non-governmental organization, registered in England, which operates as the headquarters for the global movement, Amnesty International ("AI"). Founded in 1961, AI currently comprises a global movement of 68 entities and over 2.8 million individual supporters, and is independent of any government, political ideology, economic interest or religion. The AI movement campaigns for the promotion of the respect for, the development of, and the progressive realization of, international human rights law and international humanitarian law. Its work is predicated on international rules and principles reflected in diverse norms of human rights, including treaties, general principles of international law, and rules of customary international law. AI also undertakes research and advocacy activities high-

---

[1] Pursuant to Rule 37.2, Counsel of record for all listed parties have received timely notice of intent to file this brief and have consented to filing. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, *Amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici*, its members or its counsel made a monetary contribution to its preparation or submission.

lighting violations, and advocating for justice, truth, reparation and guarantees of non-recurrence for victims of human rights violations.

BRITISH MEDICAL ASSOCIATION ("*BMA*"), founded in 1832, is the trade union and professional body for doctors in the United Kingdom. The association was initially established to create a "friendly and scientific" forum where doctors could advance and exchange medical knowledge. Following its transition into the BMA in 1855, its role expanded to become a professional body representing all medical practitioners. In this role, the BMA works with governments to lobby for improvements to health and health care, and in addition it has established a research and publishing arm (for instance through its weekly journal, the British Medical Journal), in order to lead debate on key ethical, scientific and public health matters. Research conducted by the BMA often feeds into the development of new policy.

IRISH MENTAL HEALTH LAWYERS ASSOCIATION ("*IMHLA*"), founded in 2007, is a membership composed of solicitors on the Mental Health Commission's legal representative panel and Mental Health Legal Practitioners and academics specializing in the area of mental health law. In addition to participating in the discussion on developments in the area of mental health law, the IMHLA also aims to encourage and maintain the highest standard of preparation, representation and practice in relation to mental health law. The IMHLA has previously made submissions to the Mental Health Commission in Ireland and to the government to challenge and clarify various aspects of proposed mental health legislation.

MENTAL HEALTH FOUNDATION, founded in 1949, works in the United Kingdom directly with people with mental health problems, learning disabilities and dementia, their families and services to help put policy into practice, carry out research and development work and influence national and local policy.

THE ROYAL COLLEGE OF PSYCHIATRISTS (*"RCPsych"*), founded in 1841, is an independent professional membership organization, representing over 15,000 psychiatrists in the United Kingdom and internationally. The core purposes of the RCPsych are to set standards and promote excellence in psychiatry and mental healthcare; to lead, represent and support psychiatrists; and to work with patients, care-givers and other organizations interested in delivering high quality mental health services.

As a professional body, the RCPsych has a vital role in representing the expertise of the psychiatric profession to governments and other agencies. Public education is a core aspect of the RCPsych's activities; examples of its publications include the British Journal of Psychiatry, the BJPsych Bulletin, BJPsych Advances, Evidence-Based Mental Health, BJPsych Open and BJPsych International. Part of the RCP's mission is to improve the scientific understanding of mental illness.

THE SWEDISH SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS (*"ICJ-Sweden"*) was created shortly after the establishment of the Geneva-based International Commission of Jurists ("ICJ") in 1952. Globally, the ICJ consists of 60 jurists, whose achievements in the human rights field have gained wide international recognition. The ICJ monitors and reports infringements of human rights.

ICJ-Sweden seeks to support the secretariat in Geneva, and works to promote human rights and the rule of law principles in Sweden and internationally, primarily by ensuring compliance with Sweden's international and regional human rights obligations. Its work is carried out through petitions, organizing debates and seminars as well as extensive publishing to voice opinions and participate in the legislative process.

STATEMENT OF THE CASE

Amici adopt the statement of facts in the Petition for Writ of Certiorari filed by Bobby James Moore and files this *amicus curiae* brief on behalf of Petitioner.

SUMMARY OF ARGUMENT

The Texas Court of Criminal Appeals' ("CCA") deliberate application to Mr. Moore of an outdated definition of intellectual disability is contrary to the way in which numerous non-U.S. jurisdictions[2] (the "Non-U.S. Jurisdictions") apply medical standards in the determination of a person's medical condition and the resolution of disputes. The CCA held that "[b]ecause our legislature has not enacted legislation to implement *Atkins's* mandate, we continue to follow

---

[2] Australia, Bangladesh, Belgium, Canada, Court of Justice of the European Union, European Court of Human Rights, England, France, Germany, Hong Kong, India, International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Ireland, Italy, Japan, Myanmar, New Zealand, Papua New Guinea, Pakistan, Poland, Portugal, Russia, Singapore, South Africa, South Korea, Spain and Sweden.

the AAMR's[3] 1992 definition of intellectual disability that we adopted in [*Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)] for *Atkins* claims presented in Texas death-penalty cases." *Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015). Despite the fact that the AAMR's definition of intellectual disability was updated in 2010 to align with advances in medical knowledge, the CCA nevertheless concluded that "at this juncture, the legal test we established in *Briseno* remains adequately 'informed by the medical community's diagnostic framework'". *Id.* at 487.

Medical standards are routinely used in many jurisdictions worldwide, particularly in the evaluation of expert medical evidence and in the resolution of legal disputes. However, Counsel's review of the jurisprudence on the application of medical standards in Non-US Jurisdictions did not reveal any instances of a statute requiring the application of, or a court in such jurisdictions applying (deliberately or otherwise), medical standards, tests or guidelines which the medical community generally accepted were out-of-date, nor any decisions suggesting that it would be appropriate to do so.[4]

---

[3] The American Association on Mental Retardation ("AAMR") changed its name in 2007 and is now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD").

[4] With the obvious, and irrelevant, exception of the field of medical negligence where liability is necessarily assessed against the professional standards that prevailed at the time the liability arose (but not against a standard that had been superseded at the time the liability arose).

U.S. law and practice has, on occasion, been informed by the laws and jurisprudence of other countries and the international community, including in the context of the Court's Eighth Amendment jurisprudence.[5] On the basis of the propositions espoused in the statutes and case law identified in this brief, and given the facts of this case, the Court should consider the patent unreasonableness of the CCA's application of the outdated *Briseno* test in Mr. Moore's case.

ARGUMENT

Contrary to the decision by the CCA, Counsel's review of the statutes, case law and procedural guidelines of the Non-U.S. Jurisdictions (which include both civil law and common law jurisdictions)[6] did not reveal any instance in which a medical standard that was no longer the prevailing view of the relevant medical community was applied in the resolution of a disputed issue. Indeed, Counsel's review has not identified any statutes, case law or

---

[5] *See, e.g., Glossip v. Gross*, 135 S.Ct. 2726, 2775-76 (2015) (Breyer, J., dissenting) (noting position on use of death penalty in foreign jurisdictions); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (noting "the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishment'"); *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988) (noting "[the Court has] previously recognized the relevance of the views of the international community" in determining whether a punishment is cruel and unusual).

[6] The statutes and case law of many of the Non-U.S. Jurisdictions do not provide guidance specifically in the context of capital punishment, because many of them do not have capital punishment or do not actively use it.

procedural guidelines which permit judicial disregard of widely accepted developments in medical knowledge in preference for abandoned medical standards.[7] The reasons for this are obvious. Any court or system of justice that applies abandoned medical standards will, at a minimum, suffer a significant loss of credibility, thereby undermining public respect for the judicial process and the rule of law. The wider implications of such an approach would be very disturbing indeed, not least in cases such as this which involve the application of the death penalty.

Moreover, although it is generally considered self-evident (and not worthy of discussion) in several Non-U.S. Jurisdictions that a court should not apply an outdated medical standard, numerous examples of statutes and cases demonstrate that the courts of certain Non-U.S. Jurisdictions are expressly required not to, or are not bound to, apply medical standards abandoned by the medical community.

Counsel's review of the jurisprudence of the Non-U.S. Jurisdictions indicates that the strength and reliability of expert medical evidence commonly depends, among other things, on the extent to which it is based on generally accepted medical standards in the relevant field or widely recognized guidelines and protocols. In this case, it is telling that the CCA did not provide a basis for its assertion that the medical standard adopted in *Briseno* "remains adequately 'informed by the medical community's diagnostic framework'". *Ex parte Moore*, 470 S.W.3d at 487. No such basis grounded in medical science

---

[7] Again, with the obvious, and irrelevant, exception of the field of medical negligence.

could be provided because none exists; indeed, the CCA recognized that the medical community's diagnostic framework in respect of intellectual disability has moved on since the 1992 standard adopted in *Briseno*. *See id.* at 486 – 87.

Further, in choosing to adopt a medical standard that no longer represents the prevailing view of the relevant medical community, the CCA elevated a medical standard to the level of a legal proposition that is governed by the doctrine of precedent. Not only is this erroneous, it is also contrary to the approach taken in other common law jurisdictions that also adhere to the doctrine of precedent.

In summary, the CCA's application of the now abandoned medical standard adopted in *Briseno* is wholly at odds with the relevant statutes, procedural guidelines and case law of a number of Non-U.S. Jurisdictions, as demonstrated by the following jurisprudence, and is not supported by the jurisprudence of any of the Non-U.S. Jurisdictions.

1. England

The English Court of Appeal (the second highest appellate court in England) has recognized that medical and scientific knowledge continue to evolve, and as such, "[a]s knowledge increases, today's orthodoxy may become tomorrow's outdated learning." *R v. Holdsworth* [2008] EWCA (Crim) 971, [57]. Courts should thus only apply medical standards that represent the prevailing view of the medical community.

In this regard, in a leading recent case on the issue of medical evidence, England's Court of Appeal held that prior appellate jurisprudence does not provide

authority for a medical proposition and that the English courts are required to make decisions as to the application of medical standards based on an assessment of the evidence before them. *See Henderson v. R* [2010] EWCA (Crim) 1269, [6], 2 Cr. App. 24; John Frederick Archbold, *Archbold: Criminal Pleading, Evidence and Practice* paras 10-49 (P.J. Richardson ed., 1st sup, 64th ed, Sweet & Maxwell 2016). The Court in *Henderson* noted that:

> It is trite to observe that the conclusion of any court as to the medical evidence, whether at first instance or on appeal, is dependent upon the evidence before that court. No appellate jurisprudence could provide authority for a medical proposition... Previous legal authority cannot determine whether the conclusion of a medical report should be accepted or rejected. The most legal authority can do is present an accurate record of what was or was not accepted or propounded.

Henderson v. R [2010] EWCA (Crim) 1269 [6], [2010] 2 Cr. App. 24.[8]

---

[8] The Court of Appeal further found that it was inappropriate to adhere to the medical standard adopted in *R v. Harris*, which was another decision of the same court from 2005. *See Henderson v. R* at [6]. The Court explained that:

> The strength of a proposition in medicine depends upon the strength of the medical evidence on which it is based. The quality and extent of the evidence will inevitably vary from case to case. Whilst it is now commonly accepted that the triad [the "triad" refers to a previously accepted hypothesis with respect to shaken baby syndrome which depended on findings of a triad of intracranial injuries in infants. *See R v. Harris* [2005] EWCA (Crim) 1980, [56], [2006] 1 Cr.

2. Canada

The Supreme Court of Canada (the highest court in Canada) recognizes that medical and scientific knowledge is not frozen in time, but may evolve based on improvements to existing bases of knowledge. *See, e.g., R. v. Trochym*, [2007] 1 S.C.R. 239, [31]; *R. v. J.-L.J.*, [2000] 2 S.C.R. 600, [34]. The Supreme Court held that "even if [a technique or science] has received judicial recognition in the past, a technique or science whose underlying assumptions are challenged should not be admitted in evidence without first confirming the validity of those assumptions." *R v. Trochym* at [32]. Thus, in Canadian cases, a medical standard which was accepted into evidence in a past case may subsequently be found to be inadmissible due to the later invalidity of its underlying assumptions that once may have been considered valid.

3. Australia

The High Court of Australia (the highest Court in Australia) held that Australian courts are not bound by previously accepted medical evidence in the face of contrary medical standards and knowledge that

---

App. 5], is strong evidence of shaking [contrary to the approach adopted in *R v. Harris*], that depends upon the common acceptance of experts in the field and not upon the conclusion of courts which are only able to weigh the evidence presented before them. *See id.* at [6].

The Court of Appeal in *R v. P* cited *Henderson* approvingly and noted that a "judgment constitutes legal and not medical authority." *R v. P* [2010] EWCA (Crim) 2895, [21], [31]. In England, the doctrine of precedent thus does not bind a court to follow a medical standard that has been abandoned by the medical community, or, indeed, any medical standard applied in an earlier case.

prevail in the medical community. *See, e.g.*, *Timbury v. Coffee* (1941) 66 C.L.R. 277; *Bull v. Fulton* (1942) 66 C.L.R. 295. The High Court set forth this principle over seventy years ago in *Timbury v. Coffee*. In the context of determining whether the testator lacked testamentary capacity by reason of insane delusions, the Court held that it was "not bound to go on applying views held over a century ago about mental disturbance and insanity and to disregard modern knowledge and understanding of such conditions". *Timbury v. Coffee* at 284. The High Court emphasized this principle a year later in *Bull v. Fulton*, finding that "it must be remembered... that some statements in [older judgments regarding mental diseases] are based on [then] current medical knowledge and that more is known about mental diseases now than then." *Bull v. Fulton* at 339.

The High Court's view in *Coffee* was followed as recently as 2010 by the Supreme Court of New South Wales, in which the Supreme Court observed that "many reported cases contain judicial expositions of competency, and references in them to insanity, mental illness and delusions reflect the understanding of judges and in turn, medical opinion which changes from age to age." *Burgess v. Leech*, [2007] NSWSC (July 19, 2007), [22-25]. Australia has thus explicitly recognized that medical knowledge evolves and courts are therefore not bound to apply medical standards which were relied on in previous cases when faced with updated standards based on current knowledge.

4. New Zealand

The Court of Appeal of New Zealand (an appellate court), in the case of *SR v. R*, accepted that a trial

court was entitled to prefer the evidence of an expert who had used the most recent version of an intelligence scale in assessing the accused's intelligence over the evidence of an expert who had used an outdated version. *See SR v. R*, [2011] NZCA 409, [2011] 3 N.Z.L.R. 638 (C.A.). The Court of Appeal agreed with the trial judge that the use of an outdated version of the relevant intelligence scale by an expert giving evidence in the trial "cast immediate doubt on the validity of the assessment made by [that expert]". *See id.* at [148].

The New Zealand Court of Appeal has also emphasized the need for scientific experts to follow "recognised guidelines or protocols" in giving expert opinion evidence. *See Shepard v. R* [2011] NZCA 666, [2012] 2 N.Z.L.R. 609 (C.A.) at [112]. That proposition is recognized in New Zealand's Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which defines "intellectual disability" by reference to tests "generally used by clinicians" for measurement of deficits in adaptive functioning. *See* Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 7(1).

5. European Court of Human Rights (the "ECtHR")

In a leading case on the detention of persons of "unsound mind" under Article 5(1)(e) of the European Convention on Human Rights,[9] the ECtHR

---

[9] Article 5(1)(e) of the European Convention on Human Rights provides: "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: ... (e) the lawful detention ... of persons of unsound mind...". European Convention for the Protection of

acknowledged that psychiatric knowledge does not stand still. *See Winterwerp v. Netherlands*, App. No. 6301/73, 2 Eur. H. R. Rep. 387 (1979). In *Winterwerp v. Netherlands*, the ECtHR held that the term "'persons of unsound mind'" as used in the Convention is "not [a term] that can be given a definitive interpretation...[its meaning] is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes." *See id.*, at 401.

This principle set out in *Winterwerp* was relied on by the ECtHR in *Hutchison Reid v. United Kingdom*, in which the court recognized that the grounds on which detention may be ordered under domestic law may change during a lengthy period of confinement, given that "considerable time has elapsed and medical, psychiatric and legal developments have, inevitably, occurred". *Hutchison Reid v. United Kingdom*, 2003-IV Eur. Ct. H.R. 1, 20. The ECtHR further acknowledged in *Rakevich v. Russia*, citing *Winterwerp*, that "psychiatry is an evolving field, both medically and in social attitudes". *Rakevich v. Russia*, App. No. 58973/00, [30] (Eur. Ct. H.R. Oct. 28, 2003) (HUDOC), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61414.

6. Singapore

The Singapore courts recognize that medical standards do not stand still, but rather must be considered in the light of advances in medical facts or

---

Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. 5.

knowledge. *See, e.g., Khoo James v. Gunapathy* (2002) 1 SLR(R) 1024. In the context of evaluating the standard of care expected of medical practitioners, the Court of Appeal (Singapore's highest court) held that an expert view, in order to qualify as representative of a responsible body of medical opinion, should not ignore or controvert known medical facts or advances in medical standards, noting "[t]he expert's opinion does not stand *in vacuo*. An advancement in medical science, or a known medical fact which is patently ignored, are extrinsic facts which can nevertheless render a body of opinion illogical." *See id.* at [66].

7. Sweden

In Swedish courts, experts preparing psychiatric opinions are required to use standards set out in classification systems such as the ICD-10 (International Statistical Classification of Diseases and Related Health Problems) developed by the World Health Organization, and the DSM-5 (Diagnostic and Statistical Manual of Mental Disorders) created by the American Psychological Association. *See* § 4.3 Socialstyrelsensförfattningssamling [SOSFS] 1996:14 Rättspsykiatrisk undersökning, [official publications by governmental department] (Swed.); Martin Borgeke, *Att bestämma påföljd för brott*, 310-312 (Norstedts Juridik AB, Stockholm, 2 uppl. 2012) [Book] (Swed.).

Such standards regularly undergo revisions and once such standards are translated and implemented, the new standards are applied by experts in Sweden. If the up-to-date standards are not complied with, a remark or ordinance may be imposed by the Health and Social Care Inspectorate. *See* Socialstyrelsens

information om diagnostiseringskoder [National Board of Health and Welfare's information concerning diagnostic codes] (Swed.) *available at* http://www.socialstyrlsen.se/klassificeringochkoder/diagnoskodericd (last visited Jan. 14, 2016); Inspektionen för vård och omsorg [Health and Social Care Inspectorate] (Swed.) *available at* http://www.ivo.se (last visited Jan. 14, 2016).

8. Germany

In Germany, an expert opinion used in courts is required to meet "approved scientific requirements" (*"anerkannten fachwissenschaftlichen Anforderungen"*) and has to be prepared in accordance with the "actual scientific state of knowledge" (*"aktueller wissenschaftlicher Kenntnisstand"*). *See* Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 2004, 2 StR 367/04, BGHSt 49, 347, 352; *see also* Axel Boetticher et al., *Mindestanforderungen für Prognosegutachten [Minimum requirements for prediction expert opinions]*, NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] [New Journal of Criminal Law] 537, 539 (2006); Thomas Fischer, *Strafgesetzbuch mit Nebengesetzen* [Penal Code] (63d ed. 2016), sec. 20, para. 64b.

In practice, forensic experts in Germany use the established classification systems common in forensic psychology at the time they conduct their evaluations, rather than outdated standards. For example, in the context of proceedings to determine whether a life imprisonment sentence should be suspended, the Federal Constitutional Court has noted that a "medical expert opinion has to fulfil approved scientific standards". *See* Bundesverfassungsgericht [BVerfG] [Federal

Constitutional Court], Nov. 8, 2006, 2 BvR 578/02, 2 BvR 796/02, BVerfGE 117, 71, 105.

9. Japan

The Supreme Court of Japan (the highest court in Japan) stated that when assessing the value of an expert opinion as evidence, such assessment should "tak[e] into account new findings and others from scientific and technological developments in later years as well." *See* Saikō Saibansho [Sup. Ct.] Jul. 17, 2000, 54/6 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 550.

10. Ireland

The leading textbook on evidence law in Ireland provides that in evaluating expert opinions, Irish courts will consider whether the views or methodology of an expert accord with those generally accepted in his or her field of expertise. Declan McGrath, *Evidence* 416 (2d ed. 2015); *People (DPP) v. Kelly* [2008] 3 IR 697.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

PAUL HESSLER
Counsel of Record
LINKLATERS LLP
1345 Avenue of the Americas
New York, NY 10105
(212) 903-9132
paul.hessler@linklaters.com

January 19, 2016

Counsel for Amici Curiae